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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1179.

CHARLES A. WRIGHT, INC.,
Petitioner,

v.

F. D. RICH CO., INC.,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant rehearing of its order of May 31, 1966, denying the petition for writ of certiorari herein, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the petition filed April 2, 1966, herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. At the time of this Court's order of May 31, 1966, this Court had not yet handed down its decision in *Sheppard* v. *Maxwell,* October Term, 1965, No. 490, decided on June 6, 1966.

It is respectfully submitted that the decision of the Court below is in conflict in principle with *Sheppard* v. *Maxwell.*

In the *Sheppard* case the question was whether a party was deprived of a fair jury trial because of the trial judge's failure to protect him sufficiently from influences outside of the evidence affecting the jury.

While in the *Sheppard* case the outside influence was from publicity, in this case the outside influence was the opinions of the trial judge himself, a much more potent force on the jury.

While in the *Sheppard* case sources outside the courtroom were expressing the opinion that Sheppard should not prevail, in this case it was the Court itself which expressed the opinion that Wright should not prevail.

While in the *Sheppard* case there was a question of whether or not the entire jury had heard or considered the outside influence, in this case there was little question that the jury had both heard and considered the statements of the trial judge.

While in the *Sheppard* case it was outside influences which added to and distorted the evidence, in this case it is respectfully submitted the additions and distortions came from the bench itself.

In the *Sheppard* case the Court of Appeals was reversed "despite the absence of any showing of prejudice" and without requiring "a showing of identifiable prejudice to the accused," even though the jury had been instructed concerning their duties. In this case, however, the Court of Appeals below did not reverse, because the jury had been instructed concerning their duties and because it could not say that prejudice had resulted. The Court below made it clear that "on a different record some of those comments might well constitute reversible error" (Appendix to Petition for Certiorari, p. 23). It is respectfully submitted that the Court below did not reverse in this case because it believed that "a showing of identi-

fiable prejudice" was required. It is further respectfully submitted that "a showing of identifiable prejudice" should not be required in this type of case, for the same reasons it was not required in the *Sheppard* case.

In the *Sheppard* case this Court referred to *Estes* v. *Texas,* 381 U.S. 532 (1965), for the grounds for dispensing with a showing of actual prejudice. That case (at pp. 543-544) cited with approval the language of Mr. Justice Black for the Court in *In re Murchison,* 349 U.S. 133 (1955), that " '. . . our system of law has always endeavored to prevent even the *probability* of unfairness. . . . [T]o perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt* v. *United States,* 348 U. S. 11, 14.' . . . And, as Chief Justice Taft said in *Tumey* v. *Ohio,* 273 U. S. 510, almost 30 years before: '. . . Every procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' At 532. (Emphasis supplied.) This rule was followed in *Rideau* [373 U. S. 723, 726 (1963)], and in *Turner* v. *Louisiana,* 379 U. S. 466 (1965). In each of these cases the Court departed from the approach it charted in *Stroble* v. *California,* 343 U. S. 181 (1952), and in *Irvin* v. *Dowd,* 366 U. S. 717 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), and *White* v. *Maryland,* 373 U. S. 59 (1963), we applied the same rule, although in different contexts. . . . Such untoward circumstances as

were found in those cases are *inherently bad and prejudice to the accused was presumed.*" (Emphasis added.)

Mr. Chief Justice Warren, whom Mr. Justice Douglas and Mr. Justice Goldberg joined in concurring, wrote at p. 578: "A defendant may be unable to prove that he was actually prejudiced by a televised trial, just as he may be unable to prove that the introduction of a coerced confession at his trial influenced the jury to convict him when there was *substantial evidence* to support his conviction aside from the confession, *Payne* v. *Arkansas* [356 U. S. 560, emphasis added]; that the jury refrained from making a clear-cut determination on the voluntariness question, *Jackson* v. *Denno* [378 U. S. 368]; that a particular judge was swayed by a direct financial interest in his conviction, *Tumey* v. *Ohio* [273 U. S. 510]; or that the jury gave additional weight to the testimony of certain prosecution witnesses because of the jury's repeated contacts with those witnesses during the trial, *Turner* v. *Louisiana* [379 U. S. 466]."

It is respectfully submitted that a party likewise is unable to prove that he was actually prejudiced by one-sided comments of a trial judge. He cannot demonstrate their effect or lack of effect on the jury.

Under our system of law, the decisions of disputed questions of fact are for the jury. It is for the jury and not the judge to determine the credibility of the witnesses and their testimony.

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Starr* v. *United States,* 153 U.S. 614, 626.

"This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of

opinion upon the evidence 'should be so given as not to mislead, and *especially that it should not be one-sided*' . . ." *Quercia* v. *United States,* 289 U.S. 466, 470 (emphasis added).

It is respectfully submitted that one-sided expressions of opinion by a trial judge, such as those in this case, that the plaintiff is not "entitled to recover anything," are "received with deference" by the jury and "may prove controlling," and, since they are not just "his lightest word or intimation," are probably controlling. What the jury would have decided in the absence of the trial judge's comments is pure conjecture. Neither the parties nor the trial judge nor the appellate judges could know which witnesses and testimony the jury found to be credible, and therefore could not know which evidence was substantial. It seems fair to assume that a trial judge who "seldom comment[s] on the facts" (R.A. 78) would not have attempted to influence the jury against a party by one-sided comments unless he thought there was a good possibility that that party would prevail. The party himself would not be likely to prosecute the action and the appeal, with the effort and expense involved, if he did not believe he could prevail.

It is respectfully submitted that, where the comments of a trial judge to a jury are one-sided in favor of one party to an action, there is "the probability of unfairness." *In re Murchison, supra,* at 136. The jury then decides the case, not just on the basis of the evidence, but while affected and greatly influenced by the opinions of the judge, particularly where, as here, the judge does not explain the reasons for his opinion, but simply states them on his own authority. It is respectfully submitted that a jury trial where the judge openly favors one party against the other is neither fair nor does it seem fair. It seems most

unfair to say that the jury and not the judge is to decide the facts free of outside influence yet to permit the jury to be influenced by the judge's opinion on the ultimate decision to be made by the jury. This Court has held even a reference to a master as an invasion of a jury's province: "Even this limited inroad upon the right to trial by jury ' "should seldom be made, and if at all only when unusual circumstances exist." ' *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 258. *Dairy Queen, Inc.*, v. *Wood*, 369 U.S. 469, at 478 (1962). Where both the master and the judge state their opinion that one party should not prevail, it is most unlikely that a jury will disagree. Where a trial judge adds to the evidence[1] and distorts it[2] and expresses a one-sided opinion upon the evidence,[3] then the rule that "justice must satisfy the appearance of justice" (*Offutt* v. *United States, supra,* at 14), is not being observed.

Where a juror is informed by the trial judge that in his opinion one party should prevail, then there is a "possible temptation to the average man . . . to forget the burden of proof required . . . [and] might lead him not to hold the balance nice, clear and true between" the parties. *Tumey* v. *Ohio,* 273 U.S. 510, 532. The jury is tempted not

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[1] "The Trustee in bankruptcy had a right to bring this action if he thought it was worth anything" (R.A. 75). "The Trustee may properly waive any claim to property when assertion of a claim would involve the estate in expensive litigation with a doubtful outcome" (4 Collier on Bankruptcy, § 70.42, note 4, p. 1333).

[2] "And apparently, on the very eve of the closing of the statute of limitations, he filed this suit" (R.A. 75). The records show that the action was not brought on the eve of the closing of the statute of limitations (R.A. 75).

[3] "The master's report . . . says neither one of them is entitled to recover anything. . . . I think that the master's report indicates the proper status of these parties" (R.A. 76, 78).

to consider the evidence at all, but simply to rely on the experience, knowledge and authority of the judge.

In such circumstances, as in the *Sheppard* case, it is respectfully submitted that a reversal should be ordered without requiring "a showing of identifiable prejudice."

2. It is respectfully submitted that the decisions of this Court as well as the decisions of the Courts of Appeals, are in conflict on the question of whether "a showing of identifiable prejudice" is required in cases of judge's comments to the jury.

In *Bihn* v. *United States*, 328 U.S. 633, 639 (1946), in reversing a conviction, the Supreme Court ruled that the trial judge's comment in the instructions to the jury "Did she steal them? Who did if she didn't?" was prejudicial. The Court stated (pp. 638-639): "'an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial.' . . . We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears. While there was sufficient evidence for the jury, the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence. Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government."

It is respectfully submitted that, while there was a question in the *Bihn* case as to whether the judge's comments were actually prejudicial at all in the context in which they were spoken, the requirement of an affirmative showing of

prejudice in this case conflicts with the presumption of prejudice in the *Sheppard* case. It is respectfully submitted that the Court could not determine whether the "scales were quite evenly balanced," even after taking the time to review the entire record, unless it assumed the functions of the jury and attempted to determine from "the dead record" the credibility of the witnesses and the testimony and the weight to be given them. It is further respectfully submitted that, even where the scales are weighed against a party, he should still be entitled to the same fair trial as when the scales are equal or in his favor. He should have the absolute right to a fair trial regardless of whether he has a strong or a weak case.

It is respectfully submitted that the requirement of affirmative prejudice in the *Bihn* case, *supra,* and in the Court below conflicts with the holding in *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, at 409: "A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction."

Despite the *Bihn* case, the Seventh Circuit Court of Appeals, in *United States* v. *England,* 347 F. 2d 425 (1965), at p. 436, stated: "We are not here concerned with the guilt or innocence of these appellants, and for that reason we have not attempted to weigh the evidence in the trial below with a view to possibly finding the error not prejudicial." (Note 18. "This apparently was the course taken in United States v. Rainone [192 F. 2d 860, 2d Cir. 1951], and Neeper v. United States [93 F. 2d 409, 8th Cir. 1937]. Statement to this effect is found in Schwachter v. United States [237 F. 2d 644.]" The Ninth Circuit is also in agreement with the Seventh Circuit on not attempting to weigh the evidence to determine if identifiable prejudice affirmatively appears from the whole

record. *Wilson* v. *United States,* 250 F. 2d 312, 324-325 (1957).

3. It is respectfully submitted that the decisions of this Court as well as the decisions of the Courts of Appeals are in conflict on the limitations on the privilege of trial judges to comment on the facts.

In *Quercia* v. *United States,* 289 U.S. 466, at p. 470, this Court said: "This Court has . . . emphasized the duty of the trial judge to use great care that *an expression of opinion upon the evidence 'should . . . not be one*-sided . . .'" (Emphasis added.)

Yet in *United States* v. *Murdock,* 290 U.S. 389 (1933), the Court said at page 394: "*Although the power of the judge to express an opinion as to the guilt of the defendant exists,* it should be exercised cautiously and only in exceptional cases. Such an expression of opinion was held not to warrant a reversal where upon the undisputed and admitted facts the defendant's voluntary conduct amounted to the commission of the crime defined by the statute. [Emphasis added.] *Horning* v. *District of Columbia,* 254 U.S. 135."

The *Murdock* and *Quercia* cases, *supra,* evidently overruled such cases as *Simmons* v. *United States,* 142 U.S. 148, 155 (the judge stated he regarded the testimony of guilt convincing), and *United States* v. *Philadelphia & Reading Railroad Co.,* 123 U.S. 113 (the judge stated: "you should not . . . find for the plaintiff").

Yet it is respectfully submitted that the effect of and the line drawn by the *Quercia* and *Murdock* cases is not clear, and there have been no recent cases of the United States Supreme Court in this area, although numerous petitions for certiorari have been filed.

In *Cooke* v. *Liberty Mutual Fire Insurance Co.,* 239 F. 2d 597 (8th Cir. 1957); cert. den. 353 U.S. 937, the trial judge stated his opinion that defendant was not guilty of contributory negligence. This was held proper.

In *Nunley* v. *Pettway Oil Co.,* 346 F. 2d 95 (6th Cir. 1965), the trial judge stated his opinion that the plaintiff was a licensee and not an invitee. This was held an invasion of the "ultimate fact finding function of the jury" and reversible error because "We believe the trial judge's comment on the licensee-invitee issue went beyond the limits of judicial comment" (at p. 99).

In *Virginian Railway Co.* v. *Armentrout,* 166 F. 2d 400 (4th Cir. 1948), the trial Court in his charge informed the jury of his opinion concerning the defendant's negligence. The Court in reversing said at page 405: "It was proper, of course, for the judge to array the evidence and comment upon it; but what the law envisions in this regard is judicial comment fairly explaining to the jury the contentions of the parties with respect to the evidence . . . The judge occupies a position of great influence with the jury . . . he should be careful not to . . . say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts."

In *Franano* v. *United States,* 310 F. 2d 533 (8th Cir. 1962), that Court said at pages 537-538: "A survey of cases indicates that reviewing courts are hesitant to reverse a judgment due to an allegedly unfair comment within the charge to the jury unless the trial judge clearly became argumentative and assumed the role of an advocate. . . . As stated by our court in Cook v. United States, supra, 18 F. 2d 50 at 52, and reiterated in numerous cases since then: '* * * we think the line of demarcation between what a court may say to the jury in a criminal case in expressing his opinion on the facts, and what he may not

say, is to be drawn between mere expression of opinion not partaking of such argumentative nature as to amount to advocacy, leaving to the jury absolute freedom to determine the facts, and such discussion as amounts to an argument and makes the court in fact an advocate against the defendant . . ."

It is respectfully submitted that the "line of demarcation" needs clarification at this time.

4. The question presented by this case is one of large practical importance.

The privilege of a trial judge to comment on the facts in every jury trial in the Federal Courts is a privilege which has been prohibited in Massachusetts and many other states by statute. The dangers to the conduct of a fair jury trial of permitting such a privilege may outweigh any benefits of such a privilege unless its limitations are clear to both the bench and the bar. There have been innumerable cases in the lower Federal Courts where the fairness of the judge's comments has been questioned and there probably were more cases where the question arose but was not appealed. It is respectfully submitted that a party is unlikely to feel that he has had a fair jury trial where the judge makes known to the jury from the bench how he thinks the case should be decided and lends the weight of his office to one side in the litigation against the other. Equal justice requires that the judge not lend his authority by his comments to any party to a case, regardless of how substantial or insubstantial, strong or weak, that case is. There is little need for him to aid the party who has a substantial, strong case; nor should he attempt to influence a verdict against him. He is required by our system of justice to leave the case to the jury no matter how the scales are balanced unless he may direct a verdict.

It is respectfully submitted that there is little need at all for the judge to comment on the facts in a civil jury case, as he has the authority to order a new trial after a verdict if he feels that the verdict is against the weight of the evidence. Rather than to attempt to influence the jury in arriving at its verdict and thus making the submission of the case to the jury a one-sided sham, the trial judge in a civil case, it is respectfully submitted, should await the jury verdict and then set it aside if he feels a miscarriage of justice has resulted. Even though this will necessitate a new trial, it seems far better than to hold out the right to have a case decided by a jury of one's peers, if that right actually exists, only when the trial judge chooses to let the jury decide the case free of his comments on the facts.

5. The decision of this case should clarify the boundaries of the judge's privilege to comment on the facts, as this is an extreme case, where the judge informed the jury precisely how he thought the case should be decided in very clear language.

6. If the decision of the Court below is allowed to stand, then at least in the First Circuit a trial judge by his comments will be able, in effect, to direct a verdict though there is evidence to take the case to the jury, where the Court of Appeals determines from the "dead record" that the jury was unlikely to have believed the losing party's witnesses and testimony. It is respectfully submitted that it is not for the Appellate Court to attempt to assume the functions of a jury and determine the credibility of witnesses and testimony from the record. It is further respectfully submitted that it is impossible for an appellant to prove that he was actually prejudiced by the judge's

comments, as he has no way of proving what influenced the jury in arriving at its decision. *Estes* v. *Texas, supra.* In cases where the trial judge's comments add to the evidence, distort it and express a one-sided opinion, it is respectfully submitted that prejudice should be presumed and a new trial granted. *Sheppard* v. *Maxwell, supra.*

When a trial judge makes unfair comments to a jury, there is no fair trial. When such unfair trials are permitted by a Federal Court of Appeals, does not justice demand action by the Supreme Court of the United States?

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted, and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the First Circuit.

Respectfully submitted,
LOUIS KERLINSKY,
Counsel for Petitioner.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the rules of this Court.

LOUIS KERLINSKY,
Counsel for Petitioner.